Stahl Specialty Company *and* International Brotherhood of Electrical Workers Local 1464 Affiliated with the International Brotherhood of Electrical Workers, AFL–CIO. Case 17–CA–088639

July 20, 2016

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS HIROZAWA AND MCFERRAN

On September 30, 2013, Administrative Law Judge Christine E. Dibble issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel and the Charging Party filed answering briefs, and the Respondent filed a reply brief.

On April 22, 2016, following an unpublished remand order by the Board, the judge issued the attached Order Ratifying and Adopting Decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed an answering brief and the Respondent filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] and to adopt the recommended Order as modified and set forth in full below.[3]

ORDER

The National Labor Relations Board orders that the Respondent, Stahl Specialty Company, Kingsville, Missouri, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging or otherwise discriminating against employees for supporting the International Brotherhood of Electrical Workers Local 1464 affiliated with the International Brotherhood of Electrical Workers, AFL–CIO or any other labor organization.

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[1] The Respondent excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

The Board's Order remanding this proceeding to the judge, available at https://www.nlrb.gov/case/17-CA-088639, rejected the Respondent's argument that the Acting General Counsel lacked authority to issue the complaint in this matter.

We affirm the judge's finding that the Respondent violated Sec. 8(a)(1) of the Act by posting literature threatening employees with permanent job loss if they were replaced by new hires during a strike. We do not, however, rely on the failure of the posting to make clear that it refers only to economic strikers. Statements, like those in the posting, that strikers can "lose their jobs," are unlawful even if they refer only to economic strikers. See *Baddour, Inc.*, 303 NLRB 275, 275 (1991); *Larson Tool & Stamping Co.*, 296 NLRB 895, 895—896 (1989).

We also affirm the judge's finding that the Respondent violated Sec. 8(a)(3) and (1) by discharging employee Patrick Armstrong. In doing so, however, we make the following modifications to the judge's analysis. First, we do not rely on Armstrong's participation in the Union's handbilling campaign to establish that Armstrong engaged in union activity prior to his discharge because Armstrong did not handbill until after his discharge. As explained by the judge, however, Armstrong engaged in a variety of other union activity prior to his discharge. Second, in addition to the factors cited by the judge establishing that the Respondent knew of Armstrong's union activity, we find that Machining Manager Kenneth Stewart's unlawful interrogation of Armstrong in late July 2012 further establishes that the Respondent had identified Armstrong as a union supporter prior to his discharge. See *Mardi Gras Casino & Hollywood Concessions, Inc.*, 361 NLRB No. 59 (2014), incorporating by reference 359 NLRB No. 100, slip op. at 2 (2013). Third, with respect to the Respondent's disciplinary investigation of Armstrong, although the parties do not agree on the number of meetings, if any, that the Respondent conducted with Armstrong during the course of its investigation into his conduct on August 26–27, 2012, the judge found, and we agree, that any such meetings do not undermine the ultimate conclusion that the Respondent "deliberately conducted an inadequate investigation into the charges against Armstrong to justify terminating him."

In adopting the judge's finding that the Respondent unlawfully discharged Armstrong, we agree with the judge that the Respondent's failure to follow its progressive discipline policy is evidence of animus. We find, however, that the record is sufficient to demonstrate animus even without relying on that evidence.

Member McFerran does not rely on the Respondent's failure to follow its disciplinary policy to demonstrate animus because it does not appear from the record that the Respondent consistently adhered to the progressive discipline steps within the policy when disciplining or discharging other employees. She otherwise finds the evidence sufficient to show that the General Counsel met his initial burden under *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

[2] The judge cited a number of cases decided by panels that included persons whose appointments to the Board were not valid. See *NLRB v. Noel Canning*, 134 S.Ct. 2550 (2014). We do not rely on her citation to *Connecticut Humane Society*, 358 NLRB 187 (2012). Instead, we rely on *Baddour, Inc.*, 303 NLRB 275, 275 (1991), and *Larson Tool & Stamping Co.*, 296 NLRB 895, 895—896 (1989). With respect to the judge's citation to *Hoodview Vending Co.*, 359 NLRB 187 (2012), we note that a properly constituted Board reaffirmed that decision at 362 NLRB No. 81 (2015). The judge also cited *Relco Locomotives, Inc.*, 358 NLRB 298 (2012). Prior to the issuance of *Noel Canning*, the United States Court of Appeals for the Eighth Circuit enforced the Board's Order, see 734 F.3d 764 (2013), and there is no question regarding the validity of that court's judgment.

[3] We shall modify the judge's recommended Order to conform to her unfair labor practice findings and to the Board's standard remedial language. In accordance with *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143 (2016), we shall modify the judge's recommended remedy and Order to provide for tax compensation and Social Security reporting remedies. We shall substitute a new notice to conform to the Order as modified.

(b) Placing employees under surveillance while they engage in union or other protected concerted activities.

(c) Threatening employees with closure of their work facility if they select the Union as their bargaining representative.

(d) Coercively interrogating employees about their union membership, activities, sympathies, and/or support.

(e) Threatening employees with permanent job loss if they were replaced by new hires during a strike.

(f) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Patrick Armstrong full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Make Patrick Armstrong whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in the remedy section of the decision.

(c) Compensate Patrick Armstrong for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file with the Regional Director for Region 17, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar years.

(d) Within 14 days from the date of this Order, remove from its files any reference to Patrick Armstrong's unlawful discharge, and within 3 days thereafter, notify Armstrong in writing that this has been done and that the discharge will not be used against him in any way.

(e) Within 14 days after service by the Region, post at its facility in Warrensburg, Missouri, copies of the attached notice marked "Appendix."[4] Copies of the notice, on forms provided by the Regional Director for Region 17, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since May 31, 2012.

(f) Within 21 days after service by the Region, file with the Regional Director for Region 17 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. July 20, 2016

Mark Gaston Pearce, Chairman

Kent Y. Hirozawa, Member

Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT discharge or otherwise discriminate against you for supporting the International Brotherhood of Electrical Workers Local 1464 affiliated with the In-

[4] If this Order is enforced by a judgment of the United States court of appeals, the words in the notice reading, "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

ternational Brotherhood of Electrical Workers, AFL–CIO or any other labor organization.

WE WILL NOT place you under surveillance while you engage in union or other protected concerted activities.

WE WILL NOT threaten you with closure of your work facility if you select the Union as your bargaining representative.

WE WILL NOT coercively interrogate you about your union membership, activities, sympathies, and/or support.

WE WILL NOT threaten you with permanent job loss if you were replaced by new hires during a strike.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, within 14 days from the date of this Order, offer Patrick Armstrong full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Patrick Armstrong whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest.

WE WILL compensate Patrick Armstrong for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and WE WILL file with the Regional Director for Region 17, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar years.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful discharge of Patrick Armstrong, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that we will not use the discharge against him in any way.

STAHL SPECIALTY CO.

The Board's decision can be found at www.nlrb.gov/case/17-CA-088639 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273–1940.

Anne C. Peressin, Esq., for the Acting General Counsel.
Chris Mitchell, Esq. and *Catherine Crowe, Esq.,* for the Respondent.
Thomas H. Marshall, Esq., for the Charging Party.

DECISION

STATEMENT OF THE CASE

CHRISTINE E. DIBBLE, Administrative Law Judge. This case was tried in Overland Park, Kansas, on January 15–18, 2013, and March 28, 2013. The International Brotherhood of Electrical Workers Local 1464 affiliated with the International Brotherhood of Electrical Workers, AFL–CIO (the Charging Party) filed the charge on September 5, 2012.[1] The first amended charge was filed by the Charging Party on September 18 and a second amended charge filed on November 28. The Acting General Counsel[2] issued the complaint on November 29. The Respondent filed a timely answer on December 5.

The complaint alleges that the Respondent violated Section 8(a)(1) and (3) of the National Labor Relations Act (NLRA/the Act) when (1) on or about May 31, June 13, 18, and 26, July 17, 24, and 26, and August 2 and 14, the Respondent, through Jeanne Adams, engaged in surveillance of employees' union or other protected concerted activities;[3] (2) on or about July 26, the Respondent, through Jim Spalding, threatened employees with facility closure if they selected the Union as their collective-bargaining representative;[4] (3) on or about July 26, the Respondent, through Ken Stewart, interrogated its employees about their union membership and activities and the union sentiments and activities of other employees;[5] (4) on or about July 26, the Respondent, through Ken Stewart, solicited employee complaints and grievances, and promised its employees increased benefits and improved terms and conditions of employment if they refrained from union organizational activity;[6] (5) on or about late July or early August 2012, the Respondent, through Jim Spalding, threatened not to hire employees' relatives because the employees engaged in union or other protected, concerted activities;[7] (6) on or about late July or early August 2012, the Respondent posted literature at its facility that threatened employees with permanent job loss if they were replaced by new hires during a strike;[8] and (7) on or about August 30, the Respondent discharged its employee, Patrick Christian Armstrong, because he formed, joined, and assisted the Union and engaged in concerted protected activities.[9]

On the entire record,[10] including my observation of the demeanor of the witnesses, and after considering the briefs filed

[1] All dates are in 2012, unless otherwise indicated.
[2] The Acting General Counsel is referenced as the General Counsel.
[3] This allegation is alleged in par. 5(a) of the complaint.
[4] This allegation is alleged in par. 5(b) of the complaint.
[5] This allegation is alleged in par. 5(c) of the complaint.
[6] This allegation is alleged in par. 5(d) of the complaint. The General Counsel, however, admitted that no evidence was presented in support of this allegation. (GC Br. 50.)
[7] This allegation is alleged in par. 5(e) of the complaint.
[8] This allegation is alleged in par. 6 of the complaint.
[9] This allegation is alleged in par. 7 of the complaint.
[10] Abbreviations used in this decision are as follows: "Tr." for transcript; "R. Exh." for the Respondent's exhibit; "GC Exh." for General

by the General Counsel and the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a corporation, engages in the manufacture and nonretail sale of permanent mold aluminum castings at its facility in Warrensburg, Missouri. (Tr. 16; GC Exh. 1-O.) During the 12-month period ending September 30, 2012, the Respondent annually sold and shipped from its Warrensburg, Missouri facility goods valued in excess of $50,000 directly to points outside the State of Missouri. During the 12-month period ending September 30, 2012, the Respondent as described above, purchased and received at its Warrensburg, Missouri facility goods valued in excess of $50,000 directly from points outside the State of Missouri. The Respondent admits, and I find, that at all material times it has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. (GC Exh. 1-O.)

At all material times, the Union has been a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Overview of Respondent's Operation

Since 1946, the Respondent has been a privately held corporation, becoming a subsidiary of Ligon Industries on December 31, 2010. (Tr. 387.) The Respondent operates facilities in Warrensburg and Kingsville, MIssouri, and employs approximately 270 hourly and salaried workers.[11] (Tr. 406.) The Warrensburg facility consists of several departments for the manufacture and non-retail sale of permanent mold aluminum casting parts for motorized vehicles. The departments are: foundry, processing, heat treat, machining, warehouse, inspection, shipping and receiving, and maintenance. Approximately 110 to 120 employees work at the Warrensburg facility. The Respondent's headquarters and administrative offices are at the Kingsville, Missouri location. (Tr. 390.) The Kingsville location also has a foundry with approximately 150 employees. (Tr. 405–406.)

The plant in Warrensburg is a sprawling facility with its main entrance facing south on Stahl Drive. Management and administrative staff park in the employee lot in front of the building facing Stahl Drive. (Tr. 139–141; GC Exh. 2A.) The shipping department abuts the manager's parking lot to the east. (Tr. 140–141; GC Exh. 2A.) Pride Avenue to the east of the facility leads to the parking lot for hourly employees. The hourly employee parking lot is at the end of a long driveway in the back of the plant. (Tr. 140; GC Exh. 2A.) On the west side of the facility is private property.

The machine operators in the machining department work on several machines casting parts for heavy equipment automotive and marine vehicles. (Tr. 156, 160.) The machining department includes the following computer numeric control (CNC) machines: chip claimer; Okumas 1, 2, 3, 4, 5, 6, 7; SH-1 and SH-2; air/leak check machine; and Makinos A81 and A77.[12] (Tr. 159–160, 253–255; GC Exh. 7.) The machine operators have to complete a predetermined number of parts per hour per shift. (Tr. 168.) The quotas vary according to the machine they operate. (Tr. 168–169.) It has been the Respondent's policy for two employees to work ("run") on three machines at the same time (each employee runs one machine and they share duties on the third machine). (Tr. 173, 673.)

B. Respondent's Managerial Staff

Beginning in 2007, James Spalding (Spalding) has been the Respondent's president. Since the Respondent became a subsidiary of Lignon Industries, Spalding has reported directly to its board of directors and its president, Jim Delk (Delk). Spalding is responsible for the Respondent's overall operation. (Tr. 386–387.) Krishnan Venkatesan (Venkatesan) has been employed with the Respondent for approximately 4-1/2 years, first as the technical director and later as plant manager of the Kingsville foundry. Venkatesan is currently the plant manager at the Warrensburg facility and reports directly to Spalding. (Tr. 643.) Courtney Wilkins (Wilkins) has worked for the Respondent for more than 5 years as the human resources manager and reports directly to Spalding. (Tr. 777.) From her office in Kingsville, she administers the Respondent's employee benefits, policies and procedures, and oversees employee relations and all other personnel activity. John McBride (McBride) has worked for the Respondent for 18 years and has been the foundry manager for 3 years. (Tr. 546.) He reports directly to Venkatesan. From April 2012 through September 2012, Kenneth Stewart (Stewart) was the Respondent's machining manager in the Warrensburg plant. He was responsible for the machining department's three shifts.[13] (Tr. 575–576.) Vincent Stowell (Stowell) has been employed by the Respondent for 15 years. During the past 4-1/2 years, he has been the C-shift foundry supervisor at the Warrensburg plant. McBride was his immediate supervisor for the period at issue. (Tr. 524.)

C. Initiation of Union Organizing Campaign

During the past 10 years, the Respondent has been the target of three union organizing campaigns. The first organizing campaign occurred from about 2001 to 2002 and involved the United Auto Workers (UAW). The next union organizing campaign was undertaken in 2006 with the Teamsters Union. The current campaign began on April 12, 2012, with the Charging Party.

Michelle Little (Little), a machine operator for approximately 9 years with the Respondent,[14] contacted the Charging Party, through her husband, to assist with a union organizing campaign at the Respondent's Warrensburg facility.[15] (Tr. 131–134,

Counsel's exhibit; "CP Exh." for the Charging Party's exhibit; "CP Br." for the Charging Party's brief; "GC Br." for the General Counsel's brief; and "R. Br." for the Respondent's brief.

[11] All employees referenced in the decision work in the Warrensburg facility, unless otherwise noted.

[12] The air/leak check machine is not a CNC machine. (Tr. 253.)

[13] The three shifts at the Respondent's facility are: A-shift 7 a.m. to 3 p.m.; B-shift 3 to 11 p.m.; and C-shift 11 p.m. to 7 a.m.

[14] Little currently works the A-shift and her immediate supervisor is McBride. During the period at issue, however, she worked as a machine operator on the C-shift.

[15] All events occurred at the Warrensburg facility, unless otherwise noted.

148.) As an early supporter of the organizing campaign, Little was on the organizing committee, hosted union informational meetings, and signed and collected union authorization cards. (Tr. 132–134.) On or about May 1, in response to Little's request, the Charging Party sent Jerry Gulizia (Gulizia) to serve as the lead organizer for the union campaign at the Warrensburg facility. (Tr. 194.)

Patrick Armstrong (Armstrong) worked for the Respondent for 18 years prior to his termination on August 30, 2012. (Tr. 240; GC Exh.6.) He held various positions throughout his tenure with the Respondent, most recently as a production machine operator labor grade 10 in the machining department at the Warrensburg plant.[16] In addition to supporting the two prior unionizing efforts (2001 to 2002 and 2006), Armstrong played a dominant role in the union campaign at issue. He attended the first union organizing meetings at Little's house and thereafter consistently attended the weekly meetings. Armstrong also joined the employee organizing committee, solicited union authorization cards, discussed the benefits of unionization with employees, and engaged in handbilling. (Tr. 133, 245.)

D. Respondent's Initial Actions to Counter the Union Organizing Campaign

On May 2, Jerry Helms (Helms), maintenance manager, and McBride reported to Venkatesan rumors of union organizing efforts. (Tr. 548–550, 552–555.) They told him several of the employees in the maintenance department had been invited to a union organizing meeting over the weekend. (Tr. 546, 556–557.) Shortly after receiving the news about a union campaign, Venkatesan relayed the information to Spalding. (Tr. 396, 689–690, 711–712.) Venkatesan also met with Wilkins, McBride, and Helms to discuss gathering information to confirm that a union organizing campaign had begun at the plant. (Tr. 693.)

Wilkins learned from Assistant Human Resource Administrator Jeanne Adams (Adams), that an employee had reported to her that several employees met over the weekend to discuss unionizing the Warrensburg facility. (Tr. 398, 807–808.) On May 2, Wilkins sent Spalding an email notifying him of the newly discovered information. The email read, "I'd like to spend a few minutes discussing the "news" in WB. I'd like to gather a few thoughts from you." (CP Exh. 2; Tr. 806.) During the week of May 2, Wilkins also went to the Warrensburg facility to attend a meeting with several of the managers, Spalding, and the Respondent's attorney in response to the "news" about the union campaign. (Tr. 807–808.)

Within the first week (May 2) of being notified about rumors of union activity, Spalding made at least two trips to the Warrensburg facility to gather information on the union campaign and strategize with Venkatesan and the supervisors. (Tr. 426.) On May 2, Spalding drove to the Warrensburg location to speak with Venkatesan about the rumors. (Tr. 396–399, 404.) During their discussion, Spalding cautioned Venkatesan not to speak against the unionizing campaign until he was able to convene a meeting with the management staff and provide them with training. (Tr. 407–408) In addition, Spalding questioned Helms about his knowledge of the union campaign. Helms again reported that an individual in his department had been invited to a union informational meeting over the weekend. (Tr. 396, 410.) On a second trip to the plant, Spalding asked McBride if he had heard employees discussing the union campaign. McBride acknowledged that several workers were talking about it. (Tr. 424–425.)

On his return from the plant on about May 2, Spalding and Wilkins consulted with Respondent's attorney about the actions they were legally allowed to take to advocate against unionizing the plant. Based on the feedback he received from the attorney, Spalding and Wilkins drafted a speech for Spalding to read at mandatory staff meetings convened for May 8 and July 25 or 26. (Tr. 310, 422, 819; GC Exh. 5.) He also spoke with Delk about the status of the organizing campaign. Delk responded, "Well, our philosophy about unions is we don't need them. . . . We run our business in a manner we don't need that." (Tr. 416–417.) He told Spalding to keep him informed on the pace of the organizing campaign. (Tr. 418.) During the week of May 2, Spalding, Wilkins, Venkatesan, Stewart, Stowell, McBride, Helms, Bill Bailey (B-shift supervisor), and the Respondent's attorney met to discuss the union organizing campaign. In early summer, Spalding also held a second meeting with the supervisors to discuss the widening nature of the union organizing campaign. (Tr. 574–549.) Spalding, through a series of emails, continued to work with his management team to encourage the employees' to reject unionization of the plant. (CP Exh. 9 pp. 2–6.)

E. Surveillance of Employees' Union Activity

On or about May 1, 2012, Gulizia began working on a union organizing effort at the Respondent's Warrensburg facility. He regularly attended union organizing meetings with some of the Respondent's employees and assisted in handbilling at the Warrensburg facility. (Tr. 194.) Since May 2012, weekly handbilling has occurred at the Warrensburg facility. (Tr. 783.) During the shift changes (6 a.m., 2 p.m., 3 p.m., and 5 p.m.), Gulizia engaged in handbilling primarily on the public road (Pride Avenue) at the entrance to the driveway leading into the Respondent's hourly employee parking lot. (Tr. 195–196, 204–206.) In late May, Gulizia began to notice that Adams, who had been identified to him by employees, was observing the handbilling activity from her car parked on the driveway leading to the hourly employee parking lot. (GC Exh. 2; Tr. 197.) He saw her observing the handbilling on about 8 to 12 occa-

[16] The official title of Armstrong's position at the time of his termination was production machine operator 10. (R. Exh. 2.) The job description set forth the purpose of the position as: "Operation of CNC equipment to produce machined aluminum castings and insure proper quality and quantity. Must be capable of functioning during the absence of Supervision. Expected to train new and incumbent employees in the proper process operations and insure that all Safety and Environmental Policies are understood and followed." (R. Exh. 2.) There was testimony that the machine operator labor grade 10 was commonly referred to within the Respondent's organization as the "lead". (Tr. 241, 327–328, 643–645.) Since they are expected to perform other duties to ensure their shift meets its production quota, leads infrequently operate machines. (Tr. 241, 331, 339, 583; R. Exh. 2.) It is undisputed that the lead position is not a supervisory position within the meaning of the Act.

sions for "a few minutes" each time.[17] (Tr. 198.) Over a period of several months, Gulizia also observed on three to five occasions two men unknown to him standing in the doorway of the facility watching him handbill. (Tr. 199–201, 207.)

Venkatesan first saw the handbilling in June. On two occasions he observed a person distributing handbills on the northeast corner of the Warrensburg facility but admits that he was aware of handbilling occurring every Tuesday. (Tr. 727, 739–738.) He watched the handbilling activity from the window to the east of the foundry and subsequently retrieved about five of the handbills to review. (Tr. 721–722, 728, 743.) He admittedly was upset by the handbilling activity because he felt it was disruptive and at least one employee, Mike Pfeifer, complained to him about the handbilling. (Tr. 733–735.) Venkatesan informed Spalding that there was handbilling in front of the facility. (Tr. 727, 732.) Spalding directed him to ensure that no one conducted handbilling activity on company property. (Tr. 740.)

There were a series of emails from May 2 to September 1, between Spalding, Adams, and Wilkins discussing people engaged in handbilling at the facility. (Tr. 441–442.) Spalding admitted, ". . . probably most every time there was handbilling going on, there was an email that said somebody's here handing something out, just an FYI." (Tr. 445.) On an almost weekly basis, certain unidentified employees coming into the employee parking lot would receive a handbill from a union organizer and later give the handbill to a manager or human resource staff who would forward it to Spalding. (Tr. 446; CP Exh. 9.) Spalding told Adams to investigate and ensure there was no handbilling occurring on company property. (Tr. 820.)

F. Management's Threats to Close the Company if Union Organizing Successful

In response to information he received that employees were attempting to unionize, Spalding called two mandatory meetings of the plant. (Tr. 449, 818.) The meetings were held at the facility in Warrensburg for each of the three shifts. The first meeting was held on May 8, where Spalding read a prepared speech that he drafted with assistance from Wilkins. (Tr. 422; GC Exh. 5.) It is undisputed that in each of the meetings Spalding stated in part:

> The other aluminum casting companies that do permanent mold and low pressure are non-union. That's no accident, because Ligon prefers not to operate an aluminum casting company where the employees choose to be represented by a union. And they run their companies in a way that they believe their employees will realize they don't need a union to represent them.
>
> I'm telling you that Ligon buys plants and invests in plants that are efficient and that make a profit so that Ligon can make a return on its investment. Unions love to have work rules and other processes in place that create inefficiency and make it harder to earn a profit. That is why so many union plants close and that is why we don't need any union here. Ligon can invest it's (sic) money wherever it wants and right now its investing a lot of it right here in Warrensburg, where we don't have a union. I don't want that to change. For your future and your families' future, you don't want that to change either.
>
> The point is that the turmoil that goes along with a union organizing effort distracts all of us from our work and our priorities.
>
> I've already told you today the major reason that [unionizing the plant] would be a bad idea and that is further investments in this plant would be at risk.
>
> If they ask you to sign a card asking for a union election, just say no. If they ask you to attend an organizing meeting, just say no. That will end it!
>
> If [it] doesn't end it, I'll be back here talking to you again and I'll be talking about more of the reasons that having a union here would be bad for you, your families and for this Plant. [Tr. 449; GC Exh. 5.]

Shortly after the speech was given by Spalding, the written version was posted on the bulletin board in the employee lunchroom. On July 25 or 26, Spalding convened another mandatory meeting of the entire plant to reemphasize the Respondent's desire to keep the plant nonunion. (Tr. 819.) Spalding again read from the prepared speech that he delivered on May 8. (GC Exh. 5.)

G. Management's Interrogation of Employees about Union Sentiment

Subsequent to Spalding's speech on July 25 or 26, on the negative impact unions would have on the operation of the Respondent's business, Stewart and Armstrong had a discussion in Stewart's office about the union activity. Stewart asked Armstrong the reasons he wanted to unionize the plant, if he had ever been a union member, and why no one spoke in the meeting with Spalding. Armstrong responded he had prior union membership and felt a union was needed to address employees' issues with management. Armstrong also told Stewart that speaking against Spalding's points in the meeting would have been counterproductive.[18] (Tr. 248–249.) Shortly thereafter, the conversation ended.

[17] Spalding claims Adams did not watch handbilling 8 to 12 occasions but was unsure about the number of times. (Tr. 835–836) I do not credit Spaldings testimony on this point. He has proffered nothing more than a general denial, without evidence that he had firsthand knowledge of Adam's role in the handbilling surveillance. The Respondent did not call Adams as a witness to corroborate Spalding's testimony and dispute Gulizia on this point. I also do not credit Spalding's testimony that an unidentified employee complained to Adams about people handbilling on company property. There is no evidence to corroborate his testimony on this point.

[18] Stewart denied that the conversation occurred. (Tr. 577–579, 607.) I do not credit his testimony on this point. Stewart relied on closed questions and answers to deny the occurrence of the discussion. On further questioning he responded, "I don't recall" when asked whether he had even a single conversation with Armstrong about the Union or if Armstrong told him about his father's prior union membership. (Tr. 578, 607.) Armstrong's testimony and overall demeanor were more credible than Stewart's denials of the conversation. Armstrong detailed the date, location, and approximate time of the conversation. Also, his description of the content of the discussion is believable when viewed

H. Management's Retaliation Against Employees Because of Union Support

In July 2012, the Charging Party held an informational meeting at a local restaurant, Nathan's, with several of the Respondent's employees in attendance. Jared Hunsburger (Hunsburger), processing department team leader, was at the meeting. Brandon Harrison (Harrison), an account manager at the Respondent's Kingsville plant, was also at the restaurant to have dinner with friends, but not to attend the union meeting. After the meeting, Hunsburger went to sit at the bar with Harrison and a conversation ensued. (Tr. 226.) Harrison commented to Hunsburger that it looked like a serious meeting was occurring and asked him what was going on. Hunsburger responded that it was a union meeting with an IBEW (the Charging Party) representative. In response, Harrison commented that he recognized some of the faces and asked their names. Hunsburger gave him the names of Scott Serber, Dave Reynolds, Michelle Little, and Mike Howell. (Tr. 213.) It is at this point the parties disagree on the content of the discussion.

Hunsburger testified that their discussion continued, with Harrison asking his opinions on the Union's ability to run a casting business and Spalding's business acumen. Hunsburger purportedly responded that he felt Spalding was a good business man and did not believe the Union knew how to operate a casting business. (Tr. 214.) According to Hunsburger, the conversation lasted approximately 15 minutes.

Spalding[19] testified that Harrison came to his office and told him Hunsburger approached him at Nathan's restaurant where several employees were attending a union informational meeting. According to Spalding, Harrison said Hunsburger "was just really bashing the company and telling him it was a horrible place to work." (Tr. 456.) Spalding attested that Harrison tried to relay information to him about the substance of the Union's informational meeting but he stopped him.[20] (Tr. 456.)

I find there is probably a grain of truth in both witnesses' descriptions of the conversations they had with Harrison. I have previously made clear my dissatisfaction with Spalding's veracity throughout the hearing. I can no more credit his version of the conversation than I can almost any other disputed fact he has testified about. Consequently, Harrison's testimony would have been helpful to the Respondent by corroborating Spalding's testimony on this point. Nevertheless, I cannot fully credit Hunsburger account of his conversation with Harrison or Spalding because it does not have the ring of truth. It is frustrating for me that neither the General Counsel nor the Respondent called Harrison to testify. Their testimony about Harrison's statements to them is hearsay because it is offered "to prove the truth of the matter asserted in the statement." Federal Rules of Evidence 801(c). Likewise, neither party presented an argument for allowing the hearsay because of a qualifying hearsay exception. Therefore to the extent that the parties presented hearsay evidence about Harrison's statements to Spalding and Hunsburger, I will allow it only for the purpose of establishing that Harrison held separate conversations with Spalding and Hunsburger.

Hunsburger testified that a few days prior to his discussion with Harrison at Nathan's restaurant, he had an unanticipated discussion with Spalding. During their conversation about a work-related matter, Hunsburger told Spalding that his stepson, Raul, had applied for a position with the company and asked him to check on the status of his application. Although the Respondent subcontracts employee hiring to a temporary agency, Spalding agreed to get information on Raul's application. (Tr. 235, 460.) Contrary to Hunsburger's recollection, Spalding claimed his conversation with Harrison occurred *before* he ever spoke with Hunsburger about his stepson's application. (Tr. 457–458.) (Emphasis added.) Spalding agreed with Hunsburger, however, that their initial conversation involved Hunsburger asking him to check on the status of Raul's job application and him agreeing.

I find that it is not material to the facts or credibility of either witness whether their initial conversation occurred before or after their conversations with Harrison. It is undisputed that Spalding's alleged unlawful statements occurred in a second conversation with Hunsburger, which both agree happened after the meeting at Nathan's restaurant. The parties agree that approximately a week after the meeting at Nathan's, Spalding informed Hunsburger that he had asked the temporary agency about the status of Raul's application. Spalding then noted that he had spoken with Harrison who mentioned that he had talked with Hunsburger about the union meeting held at Nathan's. Again the parties disagree regarding key aspects of the remaining portion of the conversation. Hunsburger contends that

in context. The discussion occurred almost immediately after Spalding's speech against the union campaign. It occurred in the private office of a manager who had been part of Spalding's efforts to defeat the Union. Last, Stewart's interrogation of Armstrong on his desire for and support of the Union soon after Spalding's speech has the ring of truth about it.

[19] Throughout the trial I found that Spalding was not a credible witness. The majority of his testimony was accompanied by smirks, evasion, and pregnant pauses. He gave intentionally deceptive and often confusing testimony. An example is Spalding's testimony that by August he was still unaware of Armstrong's support for the Union. Likewise, he refused to admit to when he became aware of the identity of the Union. It strains credulity to believe that Spalding was unaware of the identity of the Union or Armstrong's role in unionizing the plant. Spalding admitted the union campaign was an important event in light of Ligon's antiunion stance. (GC Exh. 5.) The evidence established soon after he learned of rumors about a unionizing effort, Spalding acted quickly against the unionizing action. He also worked closely with his managers and the human resources manager to defeat the campaign. Finally, Delk told him to keep him informed about the unionization efforts. On cross-examination, however, when presented with evidence of the improbable nature of his claim, Spalding continued to provide evasive answers and denials. When viewed in context, it substantially weakens the overall credibility of his testimony. (Tr. 409–411, 413, 417–418, 435, 828–831, 835.) (A few examples of Spalding's evasive and contradictory responses.)

[20] I do not credit Spalding's testimony on this point. Spalding and his management team admitted the rumors of a union campaign was an important event, which justified their immediate action to counter it. (Tr. 388, 396, 399, 407–408, 415, 417–418, 693.) Therefore, I do not find it plausible that Spalding would not have welcomed this information.

Spalding then immediately launched into, "Why would we want to hire somebody that thinks it is a bad place to work." (Tr. 215, 216.) He later clarified his testimony to note Spalding allegedly said, ". . . why would the Company want to hire somebody *else* that thought it was a terrible place to work."[21] (Tr. 219.) (Emphasis added.) Hunsburger inferred that Spalding was referring to his stepson. (Tr. 215.) According to Hunsburger, he tried to change the subject because he felt "intimidated" by the tone and inference of the conversation. (Tr. 221, 224–225.) It was later determined that the temporary hiring agency had rejected Raul's application and he was not offered a position at either of the Respondent's facilities. (Tr. 221, 462.)

Spalding disputes Hunsburger's version of the discussion and denies making the statements attributed to him. He testified that during their initial discussion he approached Hunsburger to thank him for talking with a customer about the process for manu-facturing the parts made at the plant. He noted, "We talked in some detail about the part process and some production issues regarding it." (Tr. 458.) This aspect of the conversation is undisputed. According to Spalding, Hunsburger then "volunteered" that he was aware of the union organizing activity and was not interested in becoming involved in any aspect of the union campaign. He stated he responded, "Jared, I appreciate that, but that's your choice." (Tr. 458–459.) I do not credit Spalding's testimony on this point. It is a self-serving statement, which makes no sense within the context of the overall conversation. Regardless, it is not material to my determination of whether Spalding's statements were unlawful.

It is undisputed that Hunsburger told Spalding his stepson had applied for a job with the Respondent and asked him to check on the status of his application. To assist Spalding in locating his stepson's application, Hunsburger gave Spalding his stepson's name (Raul) and noted that Raul listed him as a reference. Subsequently, Spalding approached Hunsburger to inform him that Raul had not listed Hunsburger as a reference and he had been "'screened out' by the temporary agency." (Tr. 46.) He claimed he offered to be a reference for Raul but Hunsburger did not accept his offer.[22] (Tr. 464–464.) I credit Spalding's testimony that he told Hunsburger, "Brandon [Harrison] reported to me that you were very upset the other night and you had a lot of bad things to say about the company in public."[23] (Tr. 46.) It is at this point, Spalding testified, that he told Hunsburger it did not "line up" for him to ask "someone who you—who is your kin to come to work at a place that you don't think is a good place to work."[24] (Tr. 465.) The conversation ended a short time later. (Tr. 465.)

I. Antiunion Literature Posted by Management

Subsequent to becoming aware of a union organizing campaign, the Respondent began posting literature in the workplace noting the negative consequences of unionizing. The majority of the literature was posted on the Respondent's bulletin board in the employee lunchroom. Some of the literature was also hung on signs in the facility and distributed by hand to employees. (Tr. 861; CP Exh. 4; CP Exh. 9 pps. 9, 33; CP Exh. 10.) Many of the postings encouraged the employees to reject the Union and highlighted negative aspects of union membership. (CP Exh. 10 pps. 2, 4, 5, 20–26.) Some of the literature set forth positive aspects of working in a nonunion workplace. (CP Exh. 10 pps.7, 8.) Nonetheless, the evidence shows that the majority of the company postings emphasized the negative consequences of unionizing. (CP Exh. 9, CP Exh. 10.)

The allegedly unlawful posting reads in relevant part:

> Strikers often lose their jobs. The Company has the right to continue operating during a strike and can hire new workers to replace strikers. When that happens, strikers lose their jobs—even if they give up on the strike and ask to come back to work. [Tr. 472–475; CP Exh. 4.]

J. August 26 Instructions from Management to Patrick Armstrong

During the period at issue, Armstrong worked as the lead on the C-shift. Although Stewart was his immediate supervisor, he would occasionally seek assistance from Stowell because he was the only supervisor on duty in the evening. (Tr. 243, 269, 517.) Armstrong would also call the manufacturing engineer, Richard Moore (Moore), at home if he needed advice on resolving technical issues related to the machines. (Tr. 175, 242–243, 303–304.)

On August 26 at 9:38 p.m., Armstrong received a text message from Stewart detailing staffing assignments for the C-shift that evening. The text message read:

> Chris,

[21] Hunsburger provides plausible testimony that during his second conversation with Spalding about Raul's application Spalding stated either, "Why would we want to hire somebody that thinks it is a bad place to work." or ". . . why would the Company want to hire somebody else that thought it was a terrible place to work." (Tr. 219.) In this rare instance, I find that Spalding is equally as credible as Hunsburger on this point. Although Spalding's and Hunsburger's iterations of the alleged unlawful statement are similar, there is an important difference. In Hunsburger's version, Spalding issues an implied threat that the Respondent will not hire Raul because of Hunsburger's alleged complaints about the company. In Spalding's version of the statement, he merely questions the logic of Hunsburger recommending that Raul work at a place Hunsburger views in a negative light. Regardless, neither version explicitly or implicitly links the statements with Hunsburger's union sympathies. Since the General Counsel has the burden of proving the allegations in the complaint by a preponderance of the evidence, I credit Spalding's testimony. See *Central National Gottesman*, 303 NLRB 143, 145 (1991) (finding that the General Counsel did not meet its burden of proof because the testimony that the allegation occurred was equally credible as the testimony that denied the allegation); *Blue Flash Express*, 109 NLRB 591, 591–592 (1954) (same), questioned on other grounds *Allegheny Ludlum Corp. v. NLRB*, 104 F.3d 1354 (D.C. Cir. 1997).

[22] I do not credit Spalding's statement on this point. If he in fact was willing to be a reference, and by inference influence the process to guarantee Raul a job, he would have done it when told by the temporary agency that the application had been rejected.

[23] As previously noted, Hunsburger agreed that Spalding made the statement to him or a closely similar statement.

> Run all three okumas on Detroit. Put someone on both Volvos and don't worry about getrag. I don't know if you have been made aware but Kevin is no longer with stahl. If you have any problems when you get in shoot me a text. [GC Exhs. 4, 12.][25]

Armstrong arrived at the plant on August 26, at approximately 10:30 p.m. and determined the steps he needed to take to carry out Stewart's instructions. Mary Meade (Meade), Randy Tucker (Tucker), Michael Ridge (Ridge), and Jessica Timmons (Timmons) worked with Armstrong that evening. In addition, Steve Cochran (Cochran) was reassigned from the foundry to assist them for part of the C-shift. (Tr. 757.) Armstrong observed that the machining area was in disarray from the work done on the B-shift. (Tr. 250–251.) The B-shift workers' totes (containers used to hold parts) and heat treat baskets had not been returned to their proper places. The "chip hoppers"[26] were full and needed to be emptied. Aluminum casting parts were stacked in front of the machine platforms and left to be transported to the inspector for inspection and shipping departments. (Tr. 250–251.)

After evaluating the workload for the night and readiness of the machines, Armstrong made the decision to assign Tucker to the Okuma 1 and A77, Meade was placed on the Okuma 3, Timmons ran the Okuma 5, and Ridge operated the air check (getrag) machine.[27] (Tr. 260, 357.) Armstrong readily admits that he did not completely follow Stewart's instructions because there were no parts to "run" on the A81 Volvo machine. During the hearing, it was explained that parts are first cast in the foundry, tested in heat treat and finally delivered to the machining department to be "machined." There were not enough Volvo parts delivered from heat treat for the C-shift to run on the A81 that evening.[28] Further, Armstrong did not interpret Stewart's text as directing him to operate a machine that evening. (GC Exh. 4, 12.)

At approximately 11:10 p.m. on August 26, Stowell approached Armstrong in the machining department to relay Venkatesan's instructions for the department's operation that evening. He also told Armstrong that he was required to operate a machine. (Tr. 269–270, 520.) Armstrong told Stowell that he would not have time to operate a machine. Stowell did not reply and did not speak to Armstrong again that evening. (Tr. 270.) Subsequent to his conversation with Stowell, Armstrong called Stewart for clarification about his instructions for work assignments that evening because the A81 machine was not ready for operation. However, Stewart did not answer the telephone so he left Stewart a voicemail message explaining the reason he could not operate the A81 machine (Tr. 276–277, 591, 596.) There is no evidence that Stewart returned Armstrong's call or otherwise tried to contact him that evening to answer his questions. (Tr. 277, 591–592.)

As a result of what Armstrong perceived to be conflicting instructions from Stewart and Venkatesan, he prioritized his duties for the night. After assigning each C-shift worker to run one or more machines according to Stewart's instructions, Armstrong spent the remainder of the evening warming up the machines, cleaning the disarray in the work area left by the prior shift, ensuring that the machine operators had enough parts to run for the shift, operating the forklift to clean the area and transport parts to the inspection department and warehouse, repairing air tools, checking machine operations, answering employee questions, and adjusting the scribe on Timmon's machine.[29] He also inspected the Hubble handles and manually rebuffed those he discovered had imperfections in the casting.[30] (Tr. 265–267.) At the end of his shift the next morning, Armstrong updated Moore on the status of the machines and the work he performed that night. (Tr. 278.)

K. August 27 Investigation into Patrick Armstrong's Work Performance the Prior Night

On August 27, Stowell sent Venkatesan an email at 12:23 a.m. noting Armstrong had not operated a machine as instructed and he would prepare a "writeup" (warning notice) of the infraction. (Tr. 528–529.) Venkatesan arrived at the plant at about 7 a.m., read Stowell's email, and reviewed the productivity report for the C-shift from the previous night. (Tr. 754–755.) Sometime prior to 8:45 a.m. he went to the machining department and spent approximately 5 minutes assessing which duties had been performed on the C-shift the previous evening. (Tr. 659–660, 666–668.) Venkatensan instructed Stewart to investigate and verify the charges noted in Stowell's email that

[25] I do not credit Stewart's testimony on this point. The Charging Party issued a subpoena for the text messages Stewart sent to Armstrong on the night at issue. Stewart testified that he sent Armstrong a text message specifically directing him to operate a machine but could not locate the message. (Tr. 14–15, 600–602, 618.) Consequently, there is no corroborating evidence. Furthermore, I find it unlikely that if the text message had existed, Stewart would have destroyed a key piece of evidence that is the linchpin of the basis for Armstrong's discharge.

[26] Chip hoppers are containers that are located behind the machines and collect the chips that break off from parts being machined.

[27] There was undisputed testimony that during the period at issue Ridge was only trained to operate the air check (getrag) machine. (Tr. 260, 357.)

[28] Venkatesan disputed Armstrong's testimony that there were not enough parts for him to operate the A81 that night. I credit Armstrong's testimony on this point. Since he did not work the C-shift that night, Venkatesan failed to persuasively explain how he would have had firsthand knowledge about the availability of parts for the A81. I also find that Venkatesan's overall testimony on the stand was dismal. Often he responded to questions on cross-examination with evasive and confusing answers. Frequently, Venkatesan provided what I perceived as deliberate nonresponsive answers to questions posed by the counsel for the Respondent. Several times I had to admonish him on this point. He also tailored many of his answers to conform to the responses he felt would best help Respondent's attorney, rather than to illuminate the truth. Based on the evasive, confusing, and vague responses Venkatesan gave on both direct and cross-examination, his overall demeanor, and the totality of the evidence, I find he was not a credible witness.

[29] Venkatesan and Stewart contend that Armstrong lied about the tasks he performed during the shift. I credit Armstrong's testimony on this point for the reasons set forth in the analysis portion of this decision.

[30] Prior to going to the wheelabrator, the machine operator looks at the Hubble handle for imperfections. If the machine operator makes a judgment that a flaw cannot be removed by the wheelabrator, the Hubble handle is then placed in a basket to be sent to the inspection department. (Tr. 612.) The imperfections can be as small as a dime or larger. (Tr. 613.)

Armstrong had failed to perform as instructed. (Tr. 650, 665.) Subsequently, Venkatesan briefly spoke with Stowell to get more information on the work performed the prior night by the C-shift employees, specifically Armstrong. (Tr. 649–651.) In response to his query about whether Armstrong operated a machine as instructed, Stowell told Venkatesan that the other operators on C-shift were not assigned to the tasks as he had instructed and Armstrong did not operate a machine. (Tr. 529.)

On the morning of August 27, soon after he arrived at work, Stewart listened to Armstrong's voice mail message from the previous night concerning one of the machines. (Tr. 591.) Upon review of the production report for the C-shift, he discovered that the A81 and an Okuma machine had not been operated. Subsequently, Stewart had a meeting with Armstrong in his office the morning of August 27 to determine why he had not fully complied with his and Venkatesan's instructions to "run" the A81 and Okuma machines.[31] He also asked Armstrong to account for his actions that evening. Armstrong reminded Stewart that he had attempted to call him for clarification of his instructions since it was not possible to operate the A81 because it was out of Volvo parts. He also recited a list of the work he performed on the night at issue. (Tr. 591–592.) Stewart told Armstrong he would investigate to verify Armstrong's account of his actions.

Stewart went to the machining department to inspect the machines and the overall condition of the area. (Tr. 593–594.) He checked the chip hoppers to determine if they had been emptied and inspected the Hubble handles. (Tr. 610–612.) It took Stewart approximately 10 to 15 minutes to complete his inspection of the work area. (Tr. 615.) He again spoke with Armstrong and told him that his inspection of the area did not confirm Armstrong's description of the work he performed on August 26. Stewart admits that he did not interview any of the worker's on the C-shift about their observations of Armstrong's work performance on the shift that prior night. (Tr. 615, 626–627.) After his discussions with Armstrong, Stewart prepared notes memorializing the meetings and informed Venkatesan about the results of his investigation. (Tr. 595, 665–666.)

On August 27 at 9:02 a.m.,Venkatesan emailed Spalding that Armstrong had not complied with his instructions to operate a machine and he recommended his termination based on his failure to follow instructions and a prior 3 day suspension. (Tr. 770.) Although he admitted that he incorrectly noted Armstrong had a prior 3-day suspension on his record, Venkatesan felt that Armstrong's action on the night of August 26 was sufficient to justify termination. Spalding agreed but noted he would discuss taking action against Armstrong with Wilkins and copied her on the email response. (Tr. 501–502, 786.)

Spalding met with Wilkins and told her to investigate Venkatesan's complaint that Armstrong was insubordinate. He also told her that Stewart had notes of his meetings with Armstrong. On August 27, Wilkins requested that Stewart send her notes of his meeting with Armstrong. He complied with her request the same day. (Tr. 597, 786–787; R. Exh. 8.) Wilkins also received from Venkatesan a forwarded email from Stowell about Armstrong's failure to operate a machine and the verbal warning notice that Stowell had begun to prepare for issuance to Armstrong. (Tr. 787.) She emailed Venkatesan and Stewart to get clarification on why Stowell did not follow up with Armstrong that night and tell him he was being insubordinate for not running a machine and to clock out and go home. (Tr. 787–788.) Wilkins also posed the question directly to Stowell. He responded that "he had other activities that he was working on" that night. (Tr. 788.) Subsequently, Wilkins instructed Stewart to notify Armstrong that he was suspended pending an investigation into the charges against him. Stewart met with Armstrong to inform that he was suspended and the human resources department would contact him about his employment status at the completion of the investigation. (Tr. 598, 788–789.)

The Respondent has a four-stage disciplinary policy set out in its employee handbook. The four steps are: Step 1—Verbal Warning: Clarifying Expectations; Step 2—Written Warning; Developing Commitment; Step 3—Written Warning: Decision Making; and Step 4—Termination of Employment. (GC Exh. 3 pp. 47–48.) Discipline is normally meted out in this order. However, the Respondent "reserves the right to determine appropriate level of action to be taken on a case by case basis in consideration of the circumstances involved." (GC Exh. 3 p. 47.)

Wilkins, with assistance from Adams, reviewed both the results of her investigation of Armstrong and his past disciplinary record. Her review of his personnel file revealed two disciplinary actions: abuse of attendance policy because he only had 16 hours attendance balance left, issued March 19, 2012;[32] and failure to meet production or quality standards, issued June 29, 2012.[33] (R. Exhs. 6, 8.) The evidence reveals that Armstrong was issued two additional verbal warnings which were not initially reviewed by Wilkins. The additional disciplines were for: unsatisfactory and careless work habits because he failed to conduct an audit prior to changing the tool on a machine, issued on July 18, 2011; and low production, issued March 25, 2012.[34] In July 2011, the verbal warning issued to Armstrong noted that

[31] The parties do not agree on the time and number of meetings Stewart held with Armstrong to discuss the work he performed on August 26. (Tr. 282–283, 636–637.) I find that resolving the conflicting testimony on this issue is not material to my analysis.

[32] Each year the Respondent places 80 hours in the attendance bank of full-time employees. The hours are dispersed on January 1 for 40 hours and the remaining 40 hours are deposited into the employees' attendance bank on July 1. Hours that are not used by the end of the calendar year cannot be carried over to the next period. (GC Exh. 3, pp. 29–30.) Although there is no evidence that Armstrong's use of the hours placed in his attendance bank was contrary to the policy in the employee handbook, he was issued a verbal warning on March 19, because he had 16 hours left in his attendance bank as of February 29. (R. Exh. 6.)

[33] Armstrong was again issued a verbal warning dated June 29, for his shift's failure to meet production or quality standards. (R. Exh. 6.)

[34] On March 25, Armstrong was given a verbal warning for running a machine with lower than required production numbers. He ran 20-plus parts as opposed to 30-plus parts. Armstrong gave undisputed testimony that he was unable to meet the production quota because he stopped to fix the chip reclaimer machine but forgot to clock off of the machine he was working on. This caused his production numbers to appear lower than required. (Tr. 294–295.)

further infractions would result in progressive corrective action. (GC Exh. 8.) Likewise, the verbal warnings issued to him on March 19 and 25, noted that the consequences of further infractions would result in progressive corrective action. (GC Exh. 9, 10.) The verbal warning Armstrong received on June 29, noted that "Failure to meet the requirements of your job description will result in further disciplinary action, per the Employee Handbook." (GC Exh. 11.)

Based on her review of his disciplinary history and the insubordination charge, Wilkins recommended that Armstrong receive a 3-day suspension with a final warning placed in his personnel file. (Tr. 790.) As part of the basis for her recommendation, Wilkins noted that contrary to Venkatesan's belief, Armstrong did not have a prior 3-day suspension in his disciplinary record. However, she later changed her recommendation from a suspension to termination because she learned from Venkatesan, in a conversation with Spalding, that Armstrong had two additional disciplines that were not in his personnel file. (Tr. 790–791; R. Exh. 6.)

On or about August 29, Wilkins contacted Armstrong to arrange a meeting with him to discuss the outcome of the investigation. A meeting was held in Venkatesan's office on August 31, with Armstrong, Wilkins and Venkatesan. (Tr. 288, 797–793.) She prepared the termination letter and a script of talking points for Venkatesan to use in the meeting. (Tr. 793; R. Exh. 5, 7; GC Exh. 6.) In the meeting, Armstrong attempted to explain the reasons for his actions but Venkatesan dismissed his explanations and handed him the termination letter. The letter explained that Armstrong was terminated for "gross negligence of assigned duties and making false reports of your activities during the shift." (GC Exh. 6.) Armstrong went to his work area, gathered his personal items, and left the plant. (Tr. 290.)

III. LEGAL STANDARDS

Section 8(a)(1) of the National Labor Relations Act (NLRA/the Act) provides that it is an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7 of the Act. The rights guaranteed in Section 7 include the right "to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." See *Brighton Retail, Inc*., 354 NLRB 441, 441 (2009).

In *Meyers Industries (Meyers 1)*, 268 NLRB 493 (1984), and in *Meyers Industries (Meyers II),* 281 NLRB 882 (1986), the Board held that "concerted activities" protected by Section 7 are those "engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself." However, the activities of a single employee in enlisting the support of fellow employees in mutual aid and protection is as much concerted activity as is ordinary group activity. Individual action is concerted if it is engaged in with the object of initiating or inducing group action. *Whitaker Corp.*, 289 NLRB 933 (1988). A conversation can constitute concerted activity when "engaged in with the object of initiating or inducing or preparing for group action or [when] it [has] some relation to group action in the interest of the employees." *Meyers II*, supra, 281 NLRB at 887 (quoting *Mushroom Transportation Co. v, NLRB,* 330 F.2d 683, 685 (3d Cir. 1964)). The object of inducing group action, however, need not be expressed depending on the nature of the conversation. See *Hoodview Vending Co.*., 359 NLRB No. 36, slip op. at 4–5 (2012).

An employer violates Section 8(a)(1) of the Act if it disciplines or discharges an employee for engaging in activity that is "concerted" within the meaning of Section 7 of the Act. If it is determined that the activity is concerted, a violation of Section 8(a)(1) will be found if the employer knew of the concerted nature of the employee's activity, the concerted activity was protected by the Act, and the adverse employment action was motivated by the employee's protected, concerted activity. *Relco Locomotives Corp*., 358 NLRB 298 (2012) (citing *Meyers Industries*, 268 NLRB 493, 497 (1984), remanded sub nom. *Prill v. NLRB* 755 F.2d 941 (D.C. Cir. 1985), cert. denied 474 U.S. 948 (1985), supplemented 281 NLRB 882 (1986), affd. sub nom. *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988)). Once the General Counsel establishes such an initial showing of discrimination, the employer may present evidence, as an affirmative defense, showing it would have taken the same action even in the absence of the protected activity. The General Counsel may offer evidence that the employer's articulated reasons are pretext or false. *Relco,* supra.

The Board applies the *Wright Line*[35] analysis to evaluate whether an adverse employment action violates 8(a)(3) of the Act. The burden is on the General Counsel to initially establish that a substantial or motivating factor in the employer's decision to take adverse employment action against an employee was the employee's union or other protected activity. In order to establish this initial showing of discrimination, the evidence must prove: (1) the employee engaged in union or concerted activities; (2) the union or concerted activities were protected by the Act; (3) the employer knew of the concerted nature of the activities; and (4) the adverse action taken against the employee was motivated by the activity. Circumstantial evidence may be used to show animus. *Camaco Lorain Mfg. Plant*, 356 NLRB 1182, 1185 (2011); *Praxair Distribution, Inc*., 357 NLRB 1048, 1048 fn. 2 (2011).

Once the General Counsel has met its initial showing that the protected conduct was a motivating or substantial reason in employer's decision to take the adverse action, the employer has the burden of production by presenting evidence the action would have occurred even absent the protected concerted activity. The General Counsel may offer proof that the employer's articulated reason is false or pretextual. *Hoodview Vending Co.,* supra*,* 359 NLRB No. 36, slip op. at 5. The General Counsel retains the ultimate burden of proving discrimination. *Wright Line,* id. However, where "the evidence establishes that the reasons given for the Respondent's action are pretextual—that is, either false or not in fact relied upon—the Respondent fails by definition to show that it would have taken the same action for those reasons, absent the protected conduct, and thus there is no need to perform the second part of the *Wright Line* analy-

[35] 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert denied 455 U.S. 989 (1982).

sis." *Golden State Foods Corp.*, 340 NLRB 382, 385 (2003) (citing *Limestone Apparel Corp*., 255 NLRB 722 (1981), enfd. 705 F.2d 799 (6th Cir. 1982)). The *Wright Line* analysis is not applicable when there is no dispute that the employer took action against the employee because the employee engaged in protected concerted activity. *Phoenix Transit System*, 337 NLRB 510, 510 (2002), enfd. 63 Fed. Appx. 524 (D.C. Cir. 2003).

IV. DISCUSSION AND ANALYSIS

A. Armstrong's Protected Union and/or Concerted Activity

The General Counsel alleges that the Respondent violated Sections 8(a)(1) and (3) of the Act by discharging Armstrong, effective August 31, 2012. The Respondent counters that Armstrong was terminated solely for gross negligence of his duties and making false reports of his work activities. (R. Br. 14.) A *Wright Line* analysis is appropriate in this case because the Respondent's motive is at issue.

I find that the General Counsel has established that the discharge of Armstrong effective August 31, 2012, violated Sections 8(a)(1) and (3) of the Act for the reasons discussed below.

The evidence clearly establishes and I find that Armstrong engaged in protected union and concerted activity. Armstrong was an early supporter of the union organizing campaign. The evidence is undisputed that he regularly attended weekly union organizing meetings, joined the employee union organizing committee, solicited union authorization cards, discussed the benefits of unionization with employees, and engaged in handbilling. (Tr. 132–133, 194–195, 212, 245–246.) Armstrong's acts are the epitome of protected union and concerted activity.

B. Respondent's Knowledge of Armstrong's Protected Union and/or Concerted Activity

I find that the evidence establishes the Respondent had knowledge of Armstrong's protected union and concerted activity.

Venkatesan and Spalding both deny knowledge of Armstrong's union activity prior to his termination. McBride, however, admitted that sometime after the union campaign began he learned the names of "[p]retty much everybody that came to the union meeting." (Tr. 549.) Armstrong was also one of the employees McBride learned had attended the union meetings. (Tr. 550, 554.) He admitted that he learned of this information and reported it to Venkatesan "sometime before the summer." (Tr. 550, 555.)[36] Consequently, McBride and Venkatesan had knowledge of Armstrong's protected union activity prior to his discharge. Since I find that McBride, a supervisor and agent of Respondent, had knowledge of Armstrong's protected activity prior to his termination, it is not necessary for me to rule on the credibility of Spalding's and Venkatesan's denials on this point.[37] Thus, I find that the Respondent had knowledge of Armstrong's protected union activity at the time a decision was made to discharge him.

C. Adverse Employment Action Based on Discriminatory Animus

The remaining question the General Counsel must prove to establish its initial burden is whether the Respondent discharged Armstrong because of discriminatory animus. I find that the General Counsel has proven the final prong of its initial burden.

The General Counsel contends that the evidence shows the Respondent was motivated to discharge Armstrong because of his union activities. The General Counsel sets forth several bases supporting its argument: (1) the intentional failure of the Respondent to adequately investigate the charges against Armstrong that led to his termination (GC Br. 26–34); and (2) the Respondent's refusal to follow its progressive disciplinary policy against Armstrong. (GC Br. 35–39.)

1. Failure to conduct a fair and meaningful investigation

As noted earlier in the decision, the facts establish that Venkatesan's investigation into the charge that Armstrong disobeyed his order to operate a machine consisted of reading Stowell's email notifying him of the occurrence, reviewing the productivity report for Armstrong's shift the night at issue, spending 5 minutes on the plant floor assessing the work that had been completed, briefly discussing with Stowell the situation, and instructing Stewart to further investigate. (Tr. 650, 659–668.) In response to Venkatesan's directive, Stewart likewise reviewed the production report for the night, conducted a 10–15-minute inspection of the work area at issue, and met with Armstrong to discuss the events.

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[36] After unnecessarily redundant questioning by counsel for the Charging Party on this point, McBride later changed his testimony to state that he did not give Venkatesan the names of Armstrong and other employees who had attended union meetings. (Tr. 555–556.) Nonetheless, I find his later denial lacks credibility. McBride testified that in early May 2012, he was informed in a supervisor's meeting that a union campaign had begun. (Tr. 547.) The meeting occurred the week of May 2. (Tr. 427–428.) He admitted that prior to this meeting, he knew that "five to ten" employees were involved in a union organizing campaign but in the meeting he learned that employee participation had become more "widespread." He testified that prior to the summer, he learned Armstrong was one of several employees that was involved in the union effort. (Tr. 548–549.) In response to counsel's unambiguous question whether he reported to "anyone in the company" the names of employees he was aware of participating in the union organizing campaign, McBride stated, without wavering, that he told Venkatesan. (Tr. 550.) Further, he noted that he told Venkatesan this information early in the summer. A reading of the transcript of this exchange reveals that the questions were clearly stated without room for multiple interpretations and McBrides' responses were also clearly articulated. There is nothing in the initial exchange which indicates that McBride did not understand the questions asked or that counsel misinterpreted the response. (Tr. 547–550.)

[37] While not ruling on the credibility of Spalding and Venkatedan on this point, I will again emphasize that I do not find credible the majority of their overall testimony. I found Spalding's testimony was evasive and calculated to be misleading. In my many years as a judge, I have never had a witness whose testimony I have found more worthy of discredit than Venkatesan's. There was virtually nothing about Venkatesan's testimony that I believed beyond the statement of his name, prior work experience, and a few undisputed facts.

The weight of the evidence supports a finding that the Respondent deliberately conducted an inadequate investigation into the charges against Armstrong to justify terminating him.

Venkatesan admitted that as soon as he read Stowell's email and prior to conducting any investigation he "absolutely" felt that Armstrong should be terminated. (Tr. 661.) After receiving feedback from Stewart on the results of his investigation into Armstrong's activities the previous evening, Venkatesan went to the machining department and spent only 5 minutes inspecting the area. (Tr. 666–667.) He testified that at about 8:45 a.m., he conducted a 5-minute review of the machining department and observed that the A77 and A81 chip baskets were full. According to Venkatesan, there were cradle and getrag parts available to run on the A77, A81, and Okumas 1 and 2. He insisted the all of the machines were operational. (Tr. 668–669, 672, 674.) Based on Stewart's report and his 5-minute review of the machining department, Venkatesan testified that he concluded Armstrong had willfully disobeyed his instructions and falsely reported his activities.

I discredit Venkatesan's testimony in its entirety. The evidence is undisputed that prior to August 26, Venkatesan had never given Stowell instructions to convey to Armstrong or any other lead. (Tr. 518, 521, 753.) It is suspicious that soon after he learned of Armstrong's unionizing activity, Venkatesan would tell Stowell to instruct Armstrong to perform a specific task, especially a task that leads rarely perform. (Tr. 518, 753.) Although Venkatesan claimed he needed Armstrong to operate a machine that evening because the shift was missing one employee, I do not find his explanation plausible. (Tr. 648.) The Respondent's spreadsheet summarizing activity in the machining department for August 26 through 27 shows one employee (Judy Holsey) was absent on the A-shift. (CP Exh. 5.) However, there is no evidence that Venkatesan instructed the lead on the A-shift to operate a machine to compensate for the absence of an employee. Based on the evidence and combined with my skepticism of Venkatesan's overall veracity as a witness, I do not credit his testimony.

Venkatesan also admitted that he had determined Armstrong should be fired based on nothing more than an email from Stowell sent within about an 1-1/2 hours into Armstrong's shift noting he had failed to operate a machine. Even Spalding had to acknowledge it was odd for Stowell to target Armstrong for discipline for failing to operate a machine a mere 1 hour and 23 minutes into the shift. (Tr. 494.)

Further, Venkatesan conceded that during his 5-minute cursory review of the machining department, he did not inspect all of the machines. He acknowledged that he saw a few chip baskets behind two of the seven machines and assumed Armstrong had not emptied them. He admitted that the baskets could have been filled by an employee on another shift after they had been emptied by Armstrong. (Tr. 667–669.) Venkatesan also provided unpersuasive testimony that there were parts Armstrong could have run on the A77 or A81 machines. (Tr. 669–673.) He failed to detail the basis for his statement, provide production reports to support his statement or provide corroborating testimony on this point. The evidence shows that the employees on the C-shift on August 26, had efficiency rates well above 100 percent, even without the absent employee. (Tr. 623–624; CP Exh. 6.) The efficiency rate of the C-shift, in combination with Armstrong's credible testimony, supports my finding that Venkatesan's testimony is unconvincing. Therefore, I do not credit his testimony on this point based on the aforementioned and his overall evasive and deceptive testimony.

Second, Venkatesan and Stewart did not interview Armstrong or any of the employees on the C-shift to confirm or discredit the charges against Armstrong. Timmons provided corroborating testimony that Armstrong spent more than an hour that night adjusting the scriber on her machine and observed him empty three or four of her full chip baskets. She also gave undisputed testimony that she never saw Armstrong idle during the shift. (Tr. 341–343.) Likewise, Tucker testified, without contradiction, that he never saw Armstrong not working that evening. On the occasions he observed him, Armstrong was buffing Hubble handles or retrieving and removing machined parts. (Tr. 348.) Based on Ridge's sightline that evening, he was able to observe half of the machining department. From his vantage point, he was only occasionally able to see Armstrong operating the forklift. (Tr. 357, 361.) Meade could only recall that she observed Armstrong operating the forklift and sweeping the floor. (Tr. 371, 373–374.) Each of them provided undisputed testimony that no one from management interviewed them about the night at issue, either before or after Armstrong's termination. An attempt at a reasonable investigation would have at minimum included interviews of those people who were most in a position to observe Armstrong's actions that evening. The record established that Venkatesan and Stewart had access to the employees who witnessed Armstrong's work performance that night but intentionally refused to interview them. (Tr. 626–627.) *American Crane Corp*., 326 NLRB 1401, 1417 (1998) (the Board held that an employer's investigation is evidence of discriminatory motive when it fails to interview key witnesses). Respondent's failure to take such action supports an inference of discriminatory animus and motivation. See *Relco Locomotives, Inc*., 358 NLRB 298, 311 (2012) (evidence that the respondent failed to adequately investigate alleged misconduct supports an inference of animus and discriminatory motivation).

As part of their investigation into Armstrong's actions, management also failed to interview Moore. It is undisputed that at least weekly Armstrong consulted Moore for technical advice. (Tr. 304.) Further, prior to leaving work each day, it was a standing practice for Armstrong to provide Moore with a detailed account of the work he performed and the status of work to be completed by the next shift. (Tr. 278–279.) On August 27, Armstrong gave the usual summary of the work he and the other employees on the C-shift completed and "anything that I thought day shift needed to be aware of." (Tr. 278.) As the only manager to speak with Armstrong immediately after his shift, he was in a position to see and assess what work had been completed on Armstrong's shift before it was tainted by the employees working the next shift. Despite the possible significance of his testimony to the investigation, neither Venkatesan nor Stewart interviewed him. Equally significant is Moore's failure to appear for the hearing despite being subpoenaed to testify. (GC Exh. 1.) *American Crane Corp*., supra at 1417.

Further, I do not find plausible Venkatesan's and Stewart's testimony that within 5 minutes of walking around the machining department, they were able to determine that Armstrong falsely reported on his activities the prior evening.

After following Venkatesan's directive to investigate Armstrong's activities on the C-shift August 26, Stewart reported to him that his review of the machining department revealed that "nothing had been done." (Tr. 665.) Sometime before 8:45 a.m. on August 27, Venkatesan went to the machining department to confirm Stewart's findings. Since Venkatesan could not remember what time he conducted his review, it is feasible that he did not visit the area until almost 2 hours into the A-shift's work. (Tr. 665–666.) He gave no credible explanation as to how 2 hours or more into the A-shift, he could distinguish between tasks that were not completed on the C-shift versus work generated by the A-shift. Venkatesan claimed the baskets for A77 and A81 were full when he checked them. Therefore, he discounted Armstrong's claim that one of the functions he performed that evening was emptying the chip baskets and hauling them away. However, he admits that it is possible the baskets could have been refilled by the A-shift before he looked at them. Also, Venkatesan admitted that he only checked 2 of the 11 machines in the department. (Tr. 667–668.) Therefore, it is plausible that the other machines' baskets were emptied by Armstrong as he alleged and Venkatesan would not have known it. Based on the foregoing and Armstrong's more truthful demeanor, I credit his testimony.

Venkatesan also attested that there were 400 Hubble handles from the previous Friday waiting to be processed by the C-shift on August 26. (Tr. 594–595.) However, Venkatesan unconvincingly testified he was able to conclude, after less than 10 minutes of review, that there were not enough Hubble handles in need of buffing to justify the amount of time Armstrong said he had spent buffing them. I do not credit Venkatesan's testimony on this point. Timmons, Tucker, and Meade corroborated Armstrong's testimony on this point. (Tr. 341–343, 348, 371, 373–374.)

I also find that Stewart conducted a cursory examination of the machining department, which could not have afforded him with enough information to determine whether Armstrong lied about his actions on the C-shift.

Stewart claimed that his review of the area revealed none of the machines' hoppers had been emptied and only 20 out of 400 Hubble handles had been buffed. (Tr. 593–594.) He attempted to explain that by looking at just 2 to 3 of the 20 buffed Hubble handles, he could tell that they were ready for wheelbrating. Stewart also insisted that from each stack he picked up 2 or 3 of the remaining 380 Hubble handles and determined none of the 380 handles had been buffed. (Tr. 612–615.) However, Stewart conceded that flaws occur in some of the handles after they are buffed. (Tr. 612–613.) He admitted that it is left to the judgment of the individual machine operator whether to send the blemished handle to the wheelbrator or manually buff out the imperfection. (Tr. 613–614.) There is no evidence to contradict Armstrong's credible testimony that in his judgment the handles required buffing. Therefore, I do not credit Stewart's testimony on these points. Stewart failed to provide a persuasive explanation of how a quick glance of a fraction of the 400 handles would enable him to determine that out of 400 handles, Armstrong only buffed 15 to 20 of them.

I previously found Stewart failed to interview Moore or key witnesses on the C-shift. (Tr. 626–627.) In addition, Stewart concedes that the lead does not usually operate a machine. (Tr. 583.) He testified that a lead is expected to operate a machine for an absent employee or when training a new employee.[38] (Tr. 583.) However, I again do not credit the argument that Armstrong needed to operate a machine the night at issue because an employee was absent from the shift for the same reasons noted earlier in the decision. Stewart and Venkatesan also argue that the A81 was operational and if there were not enough Volvo parts to run on the A81, Armstrong should have switched the machine over to run cradle parts because the machine could operate both parts. (Tr. 596–597, 670, 674.) I likewise reject this argument because there is no evidence Armstrong was trained to perform this function, nor that he was authorized or instructed to perform this function on the night at issue. Regardless, I do not credit Stewart's or Venkatesan's testimony that there were sufficient parts to operate the A81.[39] Since neither witness has proven to be reliably credible, I will not credit their testimony on this point without corroborating objective evidence.

Last, Armstrong gave credible testimony that the prior shift left the machining department in disarray which required him to clean and organize the area in order to carry out several of the duties on the C-shift. Neither Venkatesan nor Stewart provided evidence that they had firsthand knowledge that the machining department was not in disarray at the beginning of the C-shift.

The above facts, combined with the Respondent's additional acts of union animus (threat of plant closure and job loss, and unlawful surveillance and interrogation of employees), supports an inference that discriminatory animus was the actual motive for Armstrong's discharge by the Respondent.

2. Respondent failed to follow progressive discipline policy

The General Counsel argues that the Respondent's failure to follow its progressive discipline policy prior to terminating Armstrong is another factor pointing to discriminatory animus being the true motive for his discharge. The Respondent argues that it was justified in not following the usual progressive discipline steps because Armstrong's action was so egregious that it warranted immediate termination. Further, the Respondent

[38] Stewart also argues that Armstrong had a history of attempting to circumvent instructions to operate the machines. I do not credit his testimony because there was no corroborating evidence. Also, I am skeptical of the truthfulness of his overall testimony.

[39] Another example of Stewart's contradictory testimony is an email he sent to Wilkins explaining Stowell told him he had checked on Armstrong "a couple different occasions" throughout the night and noted each time he was not running a machine. (CP Exh. 8.) Stowell, however, contradicts Stewart's testimony on this point. Stowell insisted that after his initial conversation with Armstrong, he never spoke with him again and only saw him once more that evening as Armstrong was buffing handles. (Tr. 520–524.) This type of contradictory testimony weighs negatively on the overall credibility of Stewart's testimony. Further, I find the overall evidence supports my finding that Stowell was a more credible witness than Stewart.

contends that Armstrong's prior disciplinary record, combined with the current infraction, supports his immediate discharge.

I find the Respondent's failure to follow its progressive disciplinary policy is evidence of discriminatory animus against Armstrong.

It is undisputed that Armstrong had four prior infractions, one in 2011 and three in 2012. Even considered in combination, the infractions would not have led a reasonable person to conclude that termination was justified. None of the infractions were considered serious enough to warrant more than a verbal warning by his supervisor. The evidence reveals that Armstrong only received one disciplinary action in 2011. On July 18, 2011, he was issued a verbal warning for improperly changing out a tool. However, the verbal warning should not have been a part of his record by the time Wilkins reviewed his personnel file in August 2012.[40]

After reviewing his personnel file, Wilkins initially recommended that the Respondent issue Armstrong a 3-day suspension with a final warning placed in his personnel file in lieu of termination. (Tr. 790.) She testified, unconvincingly, that she revised her initial recommendation to a termination after Venkatesan told her about two prior disciplines that Armstrong had received which were not in his personnel file. (Tr. 790–791.) She provided nothing in the way of testimony or other objective evidence to support why the additional verbal warnings issued for minor infractions would justify changing her recom-mendation. In fact she appeared confused by the entire rush to terminate Armstrong. As an example, she sent an email to Venkatesan and Stewart asking why Stowell did not approach Armstrong when he observed him not operating a machine and tell him to clock out and go home because his action was insubordinate. No one, including Stowell, could provide a convincing response other than Stowell's excuse that he had other duties to take care of that evening. I do not credit Stowell, Stewart, Spalding, or Venkatesan's testimony on this point. If Stowell had time to purposely observe Armstrong allegedly on several occasions that evening, then it is reasonable to assume that he could have taken a few extra seconds to ask Armstrong why he was not working the machine and if not satisfied with the response, instruct him he was suspended for insubordination. Further, Armstrong and the other employees working the C-shift the date at issue credibly testified that after his initial con-versation with Armstrong, they did not see Stowell again for the remainder of the night.

Based on the evidence, I find that the General Counsel has established an initial showing of discrimination. Therefore, the burden shifts to the Respondent to show, as an affirmative defense, that it would have terminated Armstrong even in the absence of his union and concerted protected activities.

The Respondent argues Armstrong was discharged because: (1) Armstrong disobeyed instructions to operate a machine (R. Br. 5–6, 13.); (2) Armstrong gave a false reporting of his activities during the C-shift on August 26 (R. Br. 5–6.); and (3) Armstrong had a history of prior discipline (R. Br. 7–8, 13–14).

I find that the Respondent's reasons are pretext for discrimination. I set out earlier in the decision my reasons for finding that Armstrong did not give a false report of his activities on the C-shift on August 26. An adequate investigation by management that was not tainted by unlawful motivations would have supported most or all of Armstrong's claims. I also detailed my rationale for finding that Armstrong's prior history of discipline, in combination with the most recent charge, would likely not lead to termination but for discriminatory animus (Armstrong's prior disciplines were verbal warnings for minor infractions). Last, the evidence established that Stewart did not instruct Armstrong to operate a machine and Armstrong could not carry out Venkatesan's directive to operate a machine because the circumstances in the machining department that evening made it impossible (machining department in disarray from prior shift's work, insufficient parts to operate the A8, etc.).

Based on the evidence, I find that the Respondent discharged Armstrong for discriminatory reasons in violation of Section 8(a)(1) and (3) of the Act, as alleged in paragraph 7 of the complaint.

D. Surveillance of Employees Union and/or Other Protected Activities

The General Counsel argues that the Respondent, through its managers and administrative staff, took extraordinary and unlawful steps to observe the union activity conducted on or near its property. (GC Br. 50–51.) The Respondent refutes this charge and contends that its managers observed union activity that was "open and notorious and was subject to observation by any person (employee or nonemployee) with nonimpaired vision." (R. Br. 15.)

I find that the General Counsel has established that the Respondent conducted unlawful surveillance of its employees in violation of Sections 8(a)(1) of the Act for the reasons discussed below.

The Board and Federal case law have long held that surveillance of employees by an employer, even if the employees are unaware of it, violates the Act. *NLRB v. Grower-Shipper Vegetable Assn.*, 122 F.2d 368 (9th Cir. 1941); *Ivy Steel & Wire, Inc*., 346 NLRB 404 (2006). Nonetheless, an employer may observe employees engaging in Section 7 activities in an open and public manner on or near its property. This observation is legal if done in a manner that is not out of the ordinary and absent coercive behavior. *Smithfield Foods, Inc*., 347 NLRB 1225 (2006) (employer did not engage in illegal surveillance

[40] Armstrong testified that McBride and Foundry Supervisor Bob Brown told him it was the Respondent's policy to remove discipline from an employee's record after a year. (Tr. 299.) McBride did not dispute that he told Armstrong it was the Respondent's policy to limit the length of time discipline remained on employees' record to a year. However, Venkatesan, Spalding, and Wilkins testified that it was not the Respondent's policy to remove discipline from employees' files after a year. I do not credit their testimony on this point. I have made clear my distrust of Venkatesan's and Spalding's testimony. While Wilkins was a relatively credible witness when testifying about undisputed facts and personnel procedures, I find her testimony on this point is incomplete. Venkatesan, Wilkins, and Spalding were evasive in responding to questions on why the additional disciplines were not part of Armstrong's personnel folder; which missing disciplines were brought to Wilkins attention; and how Spalding and, or Venkatesan acquired the missing information. (Tr. 466–467, 676–678, 790–792, 830–834.) Their testimony on this point lacked credibility and was not helpful.

when, because of a reasonable concern about employee trespassing on employer property, it moved a security camera to an area where employee handbilling and trespassing had taken place); *Sprain Brook Manor Nursing Home*, 351 NLRB 1190 (2007) (the Board found unlawful surveillance where supervisor admitted to working outside her normal schedule because she believed union activity may be occurring); *Eddylean Chocolate Co*., 301 NLRB 887, 888 (1991) (noting "[t]he Board has long held that management officials may observe public union activity without violating the Act so long as those officials do not do something out of the ordinary"). Evidence of coerciveness includes, the "duration of the observation, the employer's distance from its employees while observing them, and whether the employer engaged in other coercive behavior during its observation." *Aladdin Gaming, LLC*, 345 NLRB 585, 585–586 (2005), petition for review denied 515 F.3d 942 (9th Cir. 2008). The Board has held, however, that random or isolated observations of Section 7 activities, such as handbilling, do not violate the Act. Id.

The General Counsel alleges that the Respondent, through Adams, unlawfully conducted surveillance of employees' union or other protected concerted activities. The General Counsel argues that the frequency of the observations and her proximity to the employees engaged in the activities are indicative of its coercive and unlawful nature.

Although the charge alleges the Respondent unlawfully conducted surveillance of "employees' union or other protected, concerted activities," the primary complaint involves managers' observation of employees and union officials engaged in handbilling on or near company property. It has been established that since May 2012, union organizers have conducted weekly handbilling on the public road (Pride Avenue) leading to the Respondent's hourly employee parking lot. It is also proven that beginning in late May 2012 until approximately August 7, Adams observed the handbilling from her parked car on at least 8 to 12 occasions. (Tr. 198–199.) After charges were filed against the Respondent with the National Labor Relations Board (the NLRB), Adams stopped her surveillance of the handbilling activity. (Tr. 199.) In addition, Venkatesan admitted to observing the handbilling on two occasions from a window in the foundry and was aware of the handbilling occurring each Tuesday. He reported this to Spalding. Spalding, Adams, and Wilkins exchanged a series of emails from May 2 to September 1, commenting on the handbilling activity. In response to an employee complaint and Venkatesan's concern about the handbilling, Spalding instructed Adams and Venkatesan to ensure that handbilling did not occur on company property. (Tr. 740. 820.)

Applying the standards set out in the above-cited cases, I find that the General Counsel has met his burden of proof. The evidence established on at least 8 to 12 occasions Adams parked her car in the driveway leading to the hourly employees' parking lot and observed the handbilling for "a few minutes" each time. There was no evidence to show that prior to the handbilling campaign Adams parked her car in that location. Further, her observations took place from a close vantage point and would likely have the effect of dissuading some employees from interacting with the Union for fear of reprisal. Significantly, Adams stopped her surveillance after charges were filed with the NLRB. (Tr. 199.)

The Respondent counters that Adams observed the handbilling on just two occasions in order to monitor the no-distribution/no-solicitation rule and ensure nonemployees were not trespassing on company property. However, the evidence established Adams engaged in surveillance of union activity on at least (possibly more) 8 to 12 occasions. On numerous occasions, Adams reported her observations to Spalding, Wilkins, and, or Venkatesan. (CP Exh. 9; Tr. 141–144, 198–199.) Last, there is no persuasive evidence to show that the Respondent had a reasonable basis for believing that the no solicitation or no trespassing policies were being violated.

Based on the evidence, I find that the Respondent's surveillance of employees was coercive and a violation of Section 8(a)(1) of the Act.

E. Soliciting Grievances, Promising Improved Working Conditions, and Granting Increased Benefits and Pay

The complaint alleges that on July 26, Stewart solicited employee complaints and grievances, and promised its employees increased benefits and improved terms and conditions of employment if they refrained from union organizational activity. In its brief, however, the General Counsel admits "no evidence was presented in support of the allegation that Respondent solicited grievances and promised increased benefits if employees refrained from union activity." (GC Br. fn. 5.) The General Counsel has the burden of presenting credible evidence to support the allegations in the complaint, but admits he failed.

Therefore, I recommend that paragraph 5(d) of the complaint be dismissed.

F. Threats of Adverse Consequences for Supporting the Union

The General Counsel contends that the Respondent, through Spalding, threatened not to hire employees' relatives because the employees engaged in union or other protected, concerted activities in violation of Section 8(a)(1) of the Act. (GC Exh. 1) Curiously, the Respondent rebuts this allegation using the *Wright Line* burden—shifting framework and the legal principles covering refusal to hire cases in violation of 8(a)(3) set forth in *NLRB v. Interstate Builders, Inc*., 351 F.3d 1020, 1035–1036 (10th Cir. 2003), and *Copes-Vulcan, Inc*., 237 NLRB 1253, 1257 (1978). The complaint at issue does not involve a refusal to hire allegation. Rather the gravamen of the allegation at issue is that the Respondent violated Section 8(a)(1) of the Act when its agent, Spalding, threatened an adverse consequence (refusal to hire Hunburgers' stepson) against its employee (Hunsburger) because of that employee's union or other protected, concerted activity. Further, the General Counsel argues that, taken in context, Spalding's statements to Hunsburger would "reasonably tend to restrain, coerce or interfere with rights guaranteed by the Act." *Bloomfield Health Care Center*, 352 NLRB 252 (2008), quoting *Rossmore House*, 269 NLRB 1176, 1178 fn. 20 (1984), enfd. sub nom. *HERE Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985).

The Board has established an objective test for determining if "the employer engaged in conduct which would reasonably have a tendency to interfere with the free exercise of employee rights under the Act." *Santa Barbara New-Press*, 357 NLRB 452, 476 (2011). This objective standard does not depend on whether the "employee in question was actually intimidated." *Multi-Ad Services*, 331 NLRB 1226, 1228 (2000), enfd. 255 F.3d 363 (7th Cir. 2001). The mere threat of an unspecified reprisal is sufficient to support a finding that the employer has violated Section 8 (a)(1) of the Act. *Metro One Loss Prevention Services Group*, 356 NLRB 89, 89 (2010). Although I agree that the correct standard for analyzing this allegation is the one articulated by the General Counsel, I find that the General Counsel has failed to present persuasive evidence to establish that the above conversation contained an unlawful threat of an adverse consequence for Hunsburger's support of the union organizing campaign.

The record established that in July, Spalding told Hunsburger that he had checked on the status of his stepson's application for employment with the Respondent. He then told Hunsburger that Harrison described to him a conversation he had with him at Nathan's restaurant. Spalding continued the conversation by noting Harrison told him that Hunsburger was "bashing the company". Spalding stated to Hunsburger that it did not "line up" for him to ask "someone who you—who is your kin to come to work at a place that you don't think is a good place to work." (Tr. 465.)

Although Spalding's statement could reasonably lead an employee to believe that they or someone they recommended would not get the job because they had spoken negatively about company, it does not establish a threat in violation of 8(a)(1) of the Act. While the parties disagree on the exact phrase that Spalding used, the evidence establishes that Spalding was sufficiently concerned about what he perceived to be Hunsburger's dissatisfaction with the job to question him about his comments to Harrison at Nathan's restaurant. In context, Spalding's conversation with Hunsburger is not clearly linked to Hunsburger's union support. Rather, it reveals an employer's unwillingness to hire the relative of a disgruntled employee, irrespective of that employee's union sympathies. Additional evidence to support the nondiscriminatory nature of Spalding's action is the undisputed fact that the Respondent uses a temporary agency to accept employment applications, screen the applicants, and hire employees. (Tr. 235, 460.) There is no evidence that the Respondent's managers or human resources department are aware of the applicants prior to their hire. Further, the General Counsel did not present evidence to dispute testimony that the temporary agency had "screened out" Raul's (Hunsburger's stepson) application prior to Spalding intervening to check on its status.

Accordingly, I find that the General Counsel failed to meet its burden of proof regarding this allegation and recommend that paragraph 5(e) of the complaint be dismissed.

G. Interrogation

The General Counsel argues that the Respondent, through Stewart, interrogated its employees about their union membership and activities and the union sentiments and activities of other employees. (GC Br. 54–55.) The General Counsel contends that Stewart's statements to Armstrong on July 26, were coercive, intimidating and amounted to an unlawful interrogation. The Respondent counters that Armstrong's claim that Stewart questioned him about his union sympathies was fabricated. (R. Br. 18.)

I find that the General Counsel has established that the Respondent, through Stewart, unlawfully conducted an interrogation of its employees in violation of Sections 8(a)(1) of the Act for the reasons discussed below.

The Board has adopted the test established in *Bourne v. NLRB*, 332 F.2d 47, 48 (2d Cir. 1964), to determine if management directly interrogating employees during union organizing campaigns violates Section 8(a)(1) of the Act. *Holiday Inn-JFK Airport,* 348 NLRB 16 (2006); *Smithfield Foods*, supra. Under the *Bourne* test, the factors to consider are: the background; the nature of the information sought; the identity of the questioner; the place and method of interrogation; and the truthfulness of the reply. *Westwood Health Care Center*, 330 NLRB 935, 939 (2000). In applying these factors, the Board assesses whether, based on the facts of the specific case, the questioning at issue would reasonably tend to interfere with, restrain, or coerce employees in the exercise of their statutory rights. *Rossmore House*, 269 NLRB 1176, 1177 (1984); *Temecula Mechanical, Inc*., 358 NLRB 1225 (2012).

The record establishes that on or about July 26, Stewart had a discussion with Armstrong after a mandatory employee meeting led by Spalding. Immediately following the meeting, Stewart called Armstrong into his office. There is no evidence that Armstrong was told of any legitimate reason for a meeting in which he was asked why he felt he needed a union. There is also no evidence that Stewart gave Armstrong any assurances that he could speak freely about his union sympathies or activities without reprisal. The evidence shows that the primary purpose of Stewart's talk with Armstrong was to specifically ask him why he felt that he needed a union, if had ever been a member of a union, and why none of the employees in the meeting spoke in response to Spalding's speech. Since Stewart denied knowing that Armstrong was a union supporter, it must be concluded that he questioned Armstrong in an attempt to learn about the strength and depth of his and other employees' union support.

Based on the facts, I find that Stewart's questioning of Armstrong would reasonably tend to interfere with, restrain, or coerce employees in the exercise of their statutory rights. Accordingly, I find that the Respondent violated Section 8(a)(1) of the Act when on July 26, Stewart interrogated Armstrong.

H. Threatened Employees with Facility Closure Because of Union Sympathies

The General Counsel argues that the Respondent, through Spalding, threatened employees with facility closure if they selected the Union as their collective-bargaining representative. (GC Exh. 1-M.) The General Counsel contends that Spalding's statements to employees in the July 26 meeting, given the totality of the circumstances, are an implied threat of plant closure or job loss in violation of Section 8(a)(1) of the Act. (GC Br. 53.) The Respondent counters that the Respondent, through

Spalding, merely communicated its general views about the Union to employees and the possible economic consequences of unionization. Further, Spalding denies that he told employees the Respondent's plant would close if it was unionized. (R. Br. 17.)

I find that the General Counsel has established that the Respondent, through Spalding, unlawfully threatened its employees with plant closure if they unionized in violation of Section 8(a)(1) of the Act for the reasons discussed below.

It is well understood that an employer, and by extension its agents and supervisors may "communicate to his employees any of his general views about unionism or any of his specific views about a particular union, so as long as the communications do not contain a 'threat of reprisal or force or promise of benefit.'" *Albertson's, LLC*, 359 NLRB No. 147, slip op. at 33 (2013), quoting *NLRB v. Gissel Packing Co*., 395 U.S. 575, 618 (1968). Whether the statements are a threat is viewed from the objective standpoint of the employee, over whom the employer has a measure of economic power. See *Mesker Door, Inc*., 357 NLRB 591, 595 (2011); *Inn at Fox Hollow*, 352 NLRB 1072, 1074 (2008). See also Section 8(c) of the Act (stating that the 'expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act . . . ., if such expression contains no threat of reprisal or force or promise of benefit"). An employer's communication to employees that they will jeopardize their job security, wages, or other working conditions if they support the union is a violation of Section 8(a)(1). *Metro One Loss Prevention Services Group*, supra, at 89; *Noah's Bay Area Bagels, LLC*, 331 NLRB 188 (2000).

Based on the facts and the controlling legal standard, I find that Spalding's July 26, remarks are implicit threats of plant closure or job loss in violation Section 8(a)(1) of the Act.

The evidence established that in response to rumors of a union organizing campaign, Spalding held mandatory employee meetings for each of the three shifts to express management's and the parent company's (Ligon Industries) views on unionization.[41]

In the meeting, Spalding extolled the virtues of a nonunion plant and set out the consequences of unionization. This speech came after almost 3 months of management's intense efforts to disrupt the union organizing campaign (surveillance of handbilling, consults with attorneys, discussions and meetings with management staff to discover the extent of the union campaign and its supporters, interrogating employees on their union support, and giving the same speech at a prior mandatory employee meeting).

The Respondent accurately points out that Spalding never explicitly threatened the employees with facility closure if a union was established at the plant. However, Spalding clearly implied that the employees jobs were in jeopardy if they unionized by stating because all other similar casting companies were non-union and Ligon preferred not to operate a union plant, investment in the plant would be jeopardize by a union. He also stated as a fact that unionized plants have a more difficult time making profits and many shut down solely because of union work rules and other union negotiated processes, without allowing for other factors apart from the union as the reason for lost company profits and inefficiencies. Further, this was the second time Spalding had given the same speech to the hourly employees, both times ending it with a warning that he would continue to hold similar mandatory meetings if the workers' did not end the union organizing effort by refusing to support it. (GC Exh. 5.) His comments go beyond communicating the Respondent's general views about the Union because they involved thinly veiled threats of plant closure and job loss for supporting the Union. I find that Spalding's speech reasonably would tend to restrain or coerce employees in the exercise of their Section 7 rights.

Accordingly, I find that the Respondent violated Section 8(a)(1) of the Act as alleged in paragraph 5(b) of the complaint.

I. Respondent Posted Literature Threatening Permanent Job Loss

The General Counsel argues that the Respondent, in late July or early August, posted literature at its facility that threatened employees with permanent job loss if they were replaced by new hires during a strike. (GC Exh. 1-M.) The General Counsel contends that the posting at issue "went beyond merely informing employees that they could be permanently replaced, and instead threatened, contrary to *Laidlaw*,[42] that as a result of the strike, employees are not automatically entitled to their jobs when the strike ends, or to be put on a preferential hire list." (GC Br. 56.) The Respondent counters that the "statement as to the employment consequences of a strike was merely incomplete, rather than misleading." (R. Br. 20.) The Respondent also argues that the charge should be dismissed because neither the General Counsel nor the Charging Party questioned any witness to establish that they interpreted the posting as a threat to their Section 7 rights. (R. Br. 21.)

An employer may tell its employees that they are subject to permanent replacement in the event of a strike. *Eagle Comtronics, Inc*., 263 NLRB 515, 516 (1982). An employer does not have to fully explain the nature and scope of the Act's protections for replaced strikers. *Superior Emerald Park Landfill, LLC*, 340 NLRB 449, 462 (2003); *Laidlaw*, supra. Nonetheless, the Board has held that "where an employer's statements about permanent replacements make specific references to job loss, such statements are generally deemed to be unlawful since they convey to employees the message that their employment will be terminated." *Connecticut Humane Society*, 358 NLRB 187, 220 (2012).

The Respondent's posting clearly states that strikers will lose their jobs during a strike if the company exercises its right to hire replacement workers. (CP Exh. 4.) The Respondent fails to make clear the distinction between employees who engage in economic strikes and are not entitled to immediate reinstatement if replaced, as opposed to employees who engage in unfair labor practice strikes and are protected against permanent replace-ment. See *Spurlino Materials, LLC*, 357 NLRB 1510,

[41] Venkatesan, Stewart, Wilkins, and other supervisors also attended at least one of the meetings.

[42] 171 NLRB 1366 (1968).

1524 (2011) (explains the difference between unfair labor practice strikes and economic strikes); *Connecticut Humane Society,* supra. Despite the Respondent's argument to the contrary, the posting does not, even when taken in context, "clearly" show that the Respondent was referring only to economic strikers. I find that there is absolutely nothing in the language of the posting to support the Respondent's argument. I also find without merit the Respondent's argument that the charge should be dismissed because neither the General Counsel nor the Charging Party questioned any witnesses to establish that they interpreted the posting as a threat to their Section 7 rights. The Respondent failed to provide any case law to support this argument.

I find that the General Counsel has established that the Respondent, through a posting of literature in late July or early August, threatened its employees with permanent job loss if they were replaced by new hires during a strike in violation of Section 8(a)(1) of the Act.

CONCLUSIONS OF LAW

1. The Respondent, Stahl Speciality Company, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The International Brotherhood of Electrical Workers Local 1464, affiliated with the International Brotherhood of Electrical Workers, AFL–CIO is a labor organization within the meaning of Section 2(5) of the Act.

3. By discharging Patrick Armstrong on August 31, because he engaged in union and protected concerted activities, the Respondent has violated Section 8(a)(3) and (1) of the Act.

4. By, on or about May 31, June 13, 18, and 26, July 17, 24 and 26, and August 2 and 14, engaging in surveillance of employees' union or other protected concerted activities in a manner that was out of the ordinary and coercive, the Respondent has violated Section 8(a)(1) of the Act.

5. By, on or about July 26, threatening employees with facility closure if they selected the Union as their collective-bargaining representative, the Respondent has violated Section 8(a)(1) of the Act.

6. By, on or about July 26, interrogating its employees about their union membership and activities and the union sentiments and activities of other employees, the Respondent has violated Section 8(a)(1) of the Act.

7. By, on or about late July or early August 2012, threatening not to hire employees' relatives because the employees engaged in union or other protected, concerted activities, the Respondent has violated Section 8(a)(1) of the Act.

8. By, on or about late July or early August 2012, posting literature at its facility that threatened employees with permanent job loss if they were replaced by new hires during a strike, the Respondent has violated Section 8(a)(1) of the Act.

9. The above violations are unfair labor practices that affects commerce within the meaning of Section 2(6) and (7) of the Act.

10. The Respondent has not violated the Act except as set forth above.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having discriminatorily discharged Patrick Armstrong must offer him reinstatement and make him whole for any loss of earnings and other benefits he suffered as a result of the discrimination against him from the date of the discrimination to the date of his reinstatement. Backpay shall be computed in accordance with *F. W. Woolworth Co*., 90 NLRB 289 (1950), with interest as provided in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010), enf. denied on other grounds sub. nom. *Jackson Hospital Corp. v. NLRB*, 647 F.3d 1137 (D.C. Cir. 2011).

Respondent shall file a report with the Social Security Administration allocating backpay to the appropriate calendar quarters. Respondent shall also compensate Patrick Armstrong for the adverse tax consequences, if any, of receiving one or more lump-sum backpay awards covering periods longer than 1 year, *Latino Express, Inc.,* 359 NLRB No. 44 (2012).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[43]

ORDER

The Respondent, Stahl Specialty Company, Warrensburg, Missouri, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging or otherwise discriminating against any employee for supporting the International Brotherhood of Electrical Workers Local 1464 affiliated with the International Brotherhood of Electrical Workers, AFL–CIO, or any other union.

(b) Interrogating employees about their union membership, activities, and sympathies.

(c) Engaging in surveillance of employees' union or other protected concerted activities.

(d) Threatening employees with facility closure if they select the Union as their collective-bargaining representative.

(e) Threatening adverse employment consequences against employees because they engage in union or other protected concerted activities.

(f) Posting literature at its facility threatening employees permanent job loss if they were replaced by new hires during a strike.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of the Board's Order, offer Patrick Armstrong full reinstatement to his former position or, if that position no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

[43] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(b) Make Patrick Armstrong whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in the remedy section of the decision.

(c) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful discharge of Patrick Armstrong, and within 3 days thereafter notify Patrick Armstrong in writing that this has been completed and that the discharge will not be used against him in any way.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facilities in Kingsville and Warrensburg, Missouri, copies of the attached notice marked "Appendix."[44] Copies of the notice, on forms provided by the Regional Director for Region 14 Subregion 17, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees and members are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since August 7, 2012.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. September 30, 2013

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT discharge or otherwise discriminate against any employee for supporting the International Brotherhood of Electrical Workers Local 1464, affiliated with International Brotherhood of electrical Workers, AFL–CIO, or any other union.

WE WILL NOT discharge or otherwise discriminate against any employee for engaging in union or other concerted activities protected by Section 7 of the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the rights guaranteed to them by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer Patrick Armstrong full reinstatement to his former position or, if that position no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Patrick Armstrong whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in the remedy section of the decision.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharge of Patrick Armstrong, and within 3 days thereafter notify Patrick Armstrong in writing that this has been completed and that the discharge will not be used against him in any way.

WE WILL, file a report with the Social Security Administration allocating backpay to the appropriate quarters.

WE WILL, compensate Patrick Armstrong for the adverse tax consequences, if any, of receiving one or more lump-sum backpay awards covering periods longer than 1 year.

STAHL SPECIALTY CO.

Anne C. Peressin, Esq., for the Acting General Counsel.
Chris Mitchell, Esq. and *Catherine Crowe, Esq.*, for the Respondent.
Thomas H. Marshall, Esq., for the Charging Party.

ORDER RATIFYING AND ADOPTING DECISION

On September 30, 2013, I issued a decision in this case. Subsequently, Stahl Specialty Company (Respondent) filed exceptions and a supporting brief, and the General Counsel and International Brotherhood of Electrical Workers, Local 1464 (Charging Union) filed answering briefs with the National Labor Relations Board (the Board). Respondent argued, *inter alia*, that I was appointed at a time when the Board lacked a quorum; my appointment was therefore invalid; and I lacked the lawful authority to preside over the hearing, issue a decision or otherwise act in this proceeding.

[44] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

On April 15, 2016, the Board issued an order remanding this case back to me with full authority over this matter to "decide whether or not to ratify [my] prior actions herein, to adopt or modify [my] prior decision, or to issue an entirely new decision."[1] The Board's order also stated that "[a]bsent a specific order by [me], this remand does not give the parties the opportunity to relitigate any matter previously presented for decision, nor does it give any party the right to expand the scope of the issues previously presented."

The Board agreed with the Respondent's contention that under the Supreme Court's decision in *NLRB v. Noel Canning*, 134 S.Ct. 2550 (2014), the Board lacked a valid quorum at the time that it originally approved my appointment in April 2013. However, the Board pointed out that on July 18, 2014, it ratified all administrative and personnel decisions made from January 4, 2012, to August 5, 2013, and expressly authorized my appointment. It also concluded that its ratification expressly authorized my appointment.[2] However, since my decision in this case was issued and transferred to the Board prior to the Board's July 18, 2014 ratification of my appointment, I was divested of jurisdiction as well as the opportunity to consider whether or not to ratify my prior actions. In considering all of the circumstances of this case, including its complexity, number of alleged violations, the hearing and lengthy decision, exceptions filed and Respondent's intention to continue to litigate my authority, the Board, "in an effort to remove any lingering questions," decided to remand the case to give me the opportunity to consider the issues presented now that my appointment has been fully confirmed by a legally valid five- member Board.

This complex case involves many alleged violations of the National Labor Relations Act (the Act), Sections 8(a)(1) and (3), including allegations that, during a union organizing campaign, the Respondent engaged in unlawful surveillance of union handbilling, threatened employees with plant closure if they selected the Union, interrogated an employee about his union activities and sympathies and those of other employees, threatened employees with permanent job loss if they were replaced by new hires while on strike, and unlawfully discharged a union supporter. Respondent denied violating the Act in any way, and raised several affirmative defenses. Pursuant to the Board's remand order and my now valid ratification, authority and jurisdiction over this case, I have fully reviewed my decision in light of the alleged allegations and Respondent's defenses. In doing so, I have determined that my decision (including the findings of fact, analysis, credibility determinations, conclusions and recommended order), is based on the entire record, and that it remains correct and should stand on its entirety.

IT IS SO ORDERED that all prior actions performed by me in this case are hereby ratified and that my decision issued in this case on September 30, 2013, is hereby adopted in its entirety for the reasons stated above and in the Board's remand order issued on April 15, 2016.

Dated, Washington, DC April 22, 2016

[1] Pursuant to the Board's remand order, I am only addressing the issues raised by Respondent regarding the validity of my prior actions and decision in this case. The Board has already made determinations regarding Respondent's allegations and arguments about the validity of appointments and authority of the Regional Director and Acting General Counsel in this case. (Board Order Remanding).

[2] The Board explained in its order remanding this case that it took this ratification action on July 18, 2014, "in an effort to resolve any continuing uncertainty regarding various actions taken during the time the Board lacked a quorum." See Board Order Remanding (April 15, 2016).